Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Ferd. C. Meyer, Jr.
Stanley P. Wilson
CENTRAL AND SOUTH WEST CORPORATION
2121 San Jacinto Street
Suite 2500
Dallas, Texas 75266
(214) 754-1000

Of Counsel

Jeffrey H. Howard*
Linda E. Benfield
MILLER & CHEVALIER, CHARTERED
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005-5701
(202) 626-5800

**Counsel of Record*

Counsel for Respondent

December 14, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Is a public utility's compliance with two tariffs established by the Oklahoma Corporation Commission from 1975 to 1984 immune under the state action doctrine even though a state court prospectively overturned one of the tariffs in 1984?

2. Is the lower court judgment sustainable on the independent grounds that a public utility's implementation of petitioned-for tariffs is immune under the *Noerr-Pennington* doctrine and that plaintiffs below failed to prove the substantive elements of attempted monopolization in any event?

RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of this Court, Respondent Public Service Company of Oklahoma states that it is a subsidiary of Central and South West Corporation, a public utility holding company. Central and South West Corporation is also the parent company of the following companies which have outstanding preferred stock: Central Power and Light Company, Southwestern Electric Power Company, and West Texas Utilities Company. Central and South West Corporation also owns an interest in CSW Leasing, Inc., a joint venture with CIT Group/Capital Financing, Inc., a subsidiary of Manufacturers Hanover Corporation.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 28.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	7
I. The Court Of Appeals Decision Is Correct And Consistent With The Decisions Of This Court	7
A. Oklahoma Law Clearly Articulated State Policy to Displace Competition in Rates Charged by Electric Utilities for Electricity and for Outdoor Lighting Services	9
B. The Oklahoma Corporation Commission Exercised Active Supervision Over These Rates	12
C. The State Court's Later Decision Overturning the Commission's Outdoor Lighting Order Does Not Diminish the Applicability of State Action Immunity	15
II. The Court Of Appeals Decision Is Supportable On Alternative Grounds	17
III. The Court Of Appeals Decision Is Based On Unusual Facts Which Limit Its Significance	19
IV. The Court Of Appeals Decision Does Not Warrant Review By This Court Merely To Reexamine The Evidence Or Inferences To Be Drawn From It	20
CONCLUSION	22
APPENDIX I	I-1

TABLE OF AUTHORITIES

CASES:	PAGE
324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987)	13
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	13
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	11-12,11n.9
Chickasha Cotton Oil Co. v. Corporation Comm'n, 562 P.2d 507 (Okla.), *cert. denied*, 434 U.S. 829 (1977)	4
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)	10n.8
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	17n.12
Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)	14
General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938)	20
Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484 (1985)	18
Hoover v. Ronwin, 466 U.S. 558 (1984)	17
Neumann v. Reinforced Earth Co., 786 F.2d 424 (D.C. Cir.), *cert. denied*, 107 S. Ct. 181 (1986)	19n.17
Oral Roberts Univ. v. Oklahoma Tax Comm'n, 714 P.2d 1013 (Okla. 1985)	10-11n.8
Parker v. Brown, 317 U.S. 341 (1943)	2,7-8,14,17
Patrick v. Burget, 108 S. Ct. 1658 (1988)	12-13

Table of Authorities Continued

Page

Public Service Co. of Okla. v. Oklahoma Corp. Comm'n, 688 P.2d 1274 (Okla. Dec. 27, 1983, as corrected Oct. 1, 1984) 5

Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) ..... *passim*

Subscription Television, Inc. v. Southern Cal. Theater Owners Ass'n, 576 F.2d 230 (9th Cir. 1978) 18n.13

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 12,16n.11

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 17n.12

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) 19n.14

CONSTITUTIONAL PROVISIONS & STATUTES:

Okla. Const. art. VIII, § 1 ..... 2n.2

Okla. Const. art. IX, § 15 ..... 2n.2

Okla. Const. art. IX, § 21 16

Okla. Stat. Ann. tit. 17, §§ 1, 2, 121 (West 1986) 13n.10

Okla. Stat. Ann. tit. 17, §§ 151-55 (West 1986 ..... 9,10n.8

Okla. Stat. Ann. tit. 25, §§ 301-14 (West 1987) ... 2n.2

Okla. Stat. Ann. tit. 27, § 7 (West 1976) 10

Okla. Stat. Ann. tit. 51, §§ 24A.17, 51 (West 1988) 2n.2

Okla. Stat. Ann. tit. 68, § 2449 (West 1966) 10

1971 Okla. Sess. Laws, ch. 26, § 1, ch. 322, § 1 ..... 10n.8

MISCELLANEOUS:

Oklahoma Gas and Elec. Co., Oklahoma Corp. Comm'n, Cause No. 29450, Order No. 290658 (Dec. 20, 1985) 2n.4,6n.6

Table of Authorities Continued

Page

TREATISES:

I P. Areeda & D. Turner, *Antitrust Law* ¶ 217b2 (1978) 16,17

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.2a (Supp. 1988) 18n.13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-785

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners, electrical contractors, brought this action against respondent, a regulated electric utility, charging that the utility had attempted to monopolize the outdoor lighting business in Tulsa, Oklahoma, by raising the rate it charged the contractors for the electricity used in their lighting service, while lowering the rate it charged the public for its competing lighting service. Since both rates had been established and supervised by the Oklahoma Corporation Com-

mission, the Court of Appeals unanimously held that the challenged rates were immune under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

1. *Background.* Respondent, Public Service Company of Oklahoma ("PSO"), is a regulated public utility providing electric service in eastern and southwestern Oklahoma. A-2.[1] PSO's rates, territory and services have been comprehensively regulated by the Oklahoma Corporation Commission since 1913. Tr. 1051.[2]

For at least 20 years, the Commission has uniformly regulated the outdoor lighting services of PSO and of all 33 other regulated electric utilities in Oklahoma. A-7.[3] The Commission has determined that in Oklahoma, utility-provided outdoor lighting enhances public safety and balances the electric system load.[4]

---

[1] The opinion of the Court of Appeals is appended to the Petition as Appendix A and is referred to herein by the page number of that Appendix.

[2] The Commission is an independent agency of the state created by the State Constitution and governed by three members elected by the people for six year terms, subject to removal for cause and to state mandated open meeting and open records laws. Okla. Const. art. VIII, § 1, art. IX, § 15; Okla. Stat. Ann. tit. 25, §§ 301-14 (West 1987); Okla. Stat. Ann. tit. 51, §§ 24A.17, 54 (West 1988).

[3] This includes three other investor-owned electric utilities and 30 rural electric cooperatives. Appendix A to the Brief of Public Service Company of Oklahoma in the Court of Appeals. A copy of these Appendices has been lodged with the Clerk and they are hereinafter referred to as "C.A.App.".

[4] *See, e.g., Oklahoma Gas and Elec. Co.*, Oklahoma Corp. Comm'n, Cause No. 29450, Order No. 290658 (Dec. 20, 1985) (C.A.App. M) at 9-10.

The record contains 47 tariffs for PSO's outdoor lighting services which were approved by the Commission from 1959-1984. *See* Appendix I. By at least 1968 the Commission had also authorized a special tariff of $10 per year for PSO to sell electricity to competing outdoor lighting contractors in the City of Tulsa, such as petitioners. App. I-3 (no. 11). No special tariff for a competing outdoor lighting service has ever been authorized by the Commission for the other 33 electric utilities in the state. Tr. 1584; Pet. 4, 17. From 1968 until May, 1975, petitioners enjoyed the benefits of this flat $10 per year electricity charge. Tr. 17-18.

2. *The Commission's 1975 "Atomic Bomb" Rate Order.* Prior to 1975, PSO had accumulated over 180 different tariffs, many of which imposed different rates for the same services in different areas. In May, 1975, the Commission ordered PSO to reduce the number of its tariffs to 9 and eliminate the disparity in rates because the pre-1975 rate structure "is causing confusion, unnecessary expense" and "possibly unfair discrimination." The Commission concluded that the restructuring "into nine rates is absolutely necessary and clearly in the public interest." D.Ex.5(a) (C.A.App. C) at 4-5; Tr. 1576. As the Court of Appeals found, one important consequence of this restructuring was to replace "the flat annual fee [of $10 per year for petitioners] with an outdoor metered rate." A-2. This effectively raised the average charge for electricity used by petitioners in their lighting service by approximately 79%. Tr. 24-25.

Similar restructuring was required to equalize the rates among various geographic areas. Prior to the Commission's May, 1975 Order, PSO had, for example, lower outdoor lighting rates in rural areas

than in urban areas. Tr. 27. In response to the Commission's directive that the rates be equalized, PSO requested that both rates be set at $3.95 for a 175 watt light. Tr. 1579-80, 1599. "[T]he Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits." A-7. Following the hearing, "*the Commission rejected PSO's request and chose instead to reduce PSO's rate to $3.85.*" *Id.* (emphasis added); Tr. 1599-600. The Commission thereafter denied motions for rehearing, the state supreme court affirmed the Commission's Order and this Court denied review. *Chickasha Cotton Oil Co. v. Corporation Comm'n*, 562 P.2d 507 (Okla.), *cert. denied*, 434 U.S. 829 (1977).

Petitioners brought this action in 1977 charging that the May, 1975, rate Order "was the economic equivalent of an 'atomic bomb'." A-2; Tr. 436, 470. They claimed that by raising their cost of electricity by 79% while lowering the price of PSO's competing lighting service by 4%, the rates established by the Order "killed" them. Tr. 478. Although petitioners were aware of the Commission's 1975 rate proceedings, they testified that they "neglected to go to the Corporation Commission and complain." *Id.*[5]

3. *Subsequent Action By The Oklahoma Corporation Commission.* In 1980, following notice and a second hearing, the Commission reconsidered PSO's outdoor

---

[5] In an *amicus curiae* brief filed in the District Court on August 10, 1978, the Commission stated that: "The Commission after due study, consideration and investigation has concluded that it is in the 'public interest' that electric utilities be required to provide outdoor lights to those customers who request it." *Amicus Curiae* Brief of Oklahoma Corporation Commission at 3.

lighting tariffs. Although petitioners again neglected to participate before the Commission, another intervenor argued on their behalf, after the evidentiary record had closed, that PSO's outdoor lighting rates should be decontrolled.

On May 7, 1980, the Commission rejected this contention, holding that "the contractors (plaintiffs in the District Court Case) provide outdoor lighting to commercial and industrial interests," but not to residential customers. D.Ex.5(c) (C.A.App. C) at 6. "There is little doubt that the residential user first and foremost has a public interest to be protected — namely, health, safety and welfare by the provision of outdoor security lighting." *Id.* The Commission also found that there are "economic as well as health and safety benefits" in utility-provided lighting to commercial/industrial users. *Id.* Finally, the Commission determined that "it is in the public interest that this lighting be provided at a reasonable cost, based upon the cost of service, to all customer classes, without discrimination among classes." *Id.* As a result, the Commission concluded that PSO's lighting service is "in the public interest" and that its lighting assets "should remain in rate base." *Id.*

Pursuant to this 1980 Commission Order, PSO continued to comply with Commission-prescribed lighting rates. In 1984, the Supreme Court of Oklahoma reversed the Commission's 1980 rate Order in part, on the basis that PSO's lighting service "is not used or useful to the ratepayers as a whole and thus its investment may not be included in its general rate base." *Public Service Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274, 1281 (Okla. Dec. 27, 1983, as corrected Oct. 1, 1984). This was the first and only

time that a Commission-approved outdoor lighting tariff for any of the 34 regulated electric utilities in the state had ever been overturned. The effect of this decision was to direct the Commission to decontrol the rates for PSO's outdoor lighting service prospectively, which it did by Order entered in April, 1985. A-7n.3.

Following the state court's decision, however, the Commission has continued to regulate the rates for the outdoor lighting services of the other 33 electric utilities in the state. A-7. Indeed, after PSO's lighting service was decontrolled, the Commission reconfirmed state policy to regulate utility-provided outdoor lighting services in the case of PSO's neighboring utility. The Commission distinguished the state court decision as based upon the absence of record evidence and held that outdoor lighting "improves the system load factor and security lights are a benefit to the public as a crime deterrent."[6]

4. *Proceedings Below.* The first trial of this action ended in a directed verdict for PSO for failure to prove a sufficient nexus to interstate commerce. The Court of Appeals reversed. 701 F.2d 794 (1983). The second trial ended in judgment for plaintiffs for over $2.5 million, including treble damages and costs. The trial court denied PSO's motions for directed verdict and judgment notwithstanding the verdict. In June, 1988, by unanimous decision, the Court of Appeals reversed, holding that the core conduct in question was immune under the state action doctrine, that there was insufficient proof of non-immune conduct to sustain the judgment, and that plaintiffs had failed

---

[6] A-8n.4; *Oklahoma Gas and Elec. Co.* (C.A. App. M) at 9-10.

to prove specific intent to monopolize in any event. A-1.

Relying on *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), the Court of Appeals concluded that Oklahoma law clearly articulated state policy to displace competition with regulation of PSO's electricity and outdoor lighting rates; that the Commission had actually established the challenged rates and actively supervised PSO's compliance; and that the 1984 decision of the state court reversing the Commission's 1980 outdoor lighting tariff "did not alter PSO's responsibility to comply with rates mandated by the Commission before 1984." A-7.

In an *amicus curiae* brief filed in the Court of Appeals on September 25, 1986, the Commission stated that: utility-provided outdoor lighting "is in the public interest because it may deter crime and improve the system load factor" (Br. 2); the Commission had established and supervised PSO's electricity and outdoor lighting rates from 1975 to 1985 and "PSO was required by state law to charge the approved rates" (Br. 3); and the 1984 state court decision "did not alter the duty of PSO to have complied with those rates prior to that time." Br. 4.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court Of Appeals Decision Is Correct And Consistent With The Decisions Of This Court.

As the Court of Appeals correctly held, the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) protects private parties when "1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and 2) the

state actively supervises the private anticompetitive conduct at issue." A-4.

In applying this test in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), this Court emphasized that in order to qualify for immunity, a private party "need not 'point to a specific, detailed legislative authorization' for its challenged conduct" so long as "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." *Id.* at 64 (citations omitted). The Court also noted that state agencies are designed to deal with issues "unforseeable to, or outside the competence of the legislature" and if greater specificity were required, it would "diminish, if not destroy" the usefulness of such agencies in effectuating state policy. *Id.*

For these reasons, even where a state statute did not refer to the challenged conduct, this Court held in *Southern Motor* that by conferring the power to set rates, the legislature made clear its intent to displace competition with regulation. *Id.* As the Court concluded, where the details were left to the agency which "has exercised its discretion by actively encouraging" the challenged conduct, "[w]e do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity." *Id.*

As the following discussion demonstrates, the Court of Appeals correctly applied this law to the circumstances present here.

A. Oklahoma Law Clearly Articulated State Policy to Displace Competition in Rates Charged by Electric Utilities for Electricity and for Outdoor Lighting Services.

Under Oklahoma law, "the legislature has given the Commission general supervision over all public utilities that supply 'the production, transmission, delivery, or furnishing of heat *or light* with gas [and the] . . . electric current for *light*, heat or power'." A-6; Okla. Stat. Ann. tit. 17, §§ 151-55 (West 1986).

> Within this domain, the Commission has the power to prescribe "rules, requirements and regulations, affecting [the utilities'] services, operation, and the management and conduct of their business." Okla. Stat. tit. 17, § 152. The Commission also establishes and enforces rates "as may be reasonable and just." Okla. Const. art. IX, § 18. The constitution states that the authority of the Commission to prescribe these rates is paramount; rates which are inconsistent with the Commission's rates "shall be unlawful and void." *Id.* To carry out this mandate, the Commission may exercise "full visitorial and inquisitorial power to examine . . . public utilities . . . ." Okla. Stat. tit. 17, § 152. Furthermore, the Commission must periodically conduct detailed rate investigations and continually oversee public utilities' compliance with rate schedules which include fuel adjustment clauses. Okla. Stat. tit. 17, §§ 252, 263.

A-6. Based on these clearly articulated authorities, the lower court properly held that the State of Oklahoma had manifested its intent to displace competi-

tion in the rates charged by regulated electric utilities for electricity and for outdoor lighting services. *Id.*[7]

The correctness of the lower court's decision is confirmed by other Oklahoma laws and by the practice of the Oklahoma Corporation Commission. For example, Oklahoma law also requires that "electric light and power companies" file tax returns with the state describing, *inter alia*, "the total amount of poles, wire and other *equipment for the transportation or transmission of light*, heat and power . . . ." Okla. Stat. Ann. tit. 68, § 2449 (West 1966) (emphasis added). Similarly, the Oklahoma statutes grant any company organized "*to furnish light*, heat or power *by electricity* or gas" the right to exercise the power of eminent domain. Okla. Stat. Ann. tit. 27, § 7 (West 1976). Thus, although not required for immunity under the state action doctrine, the legislature has expressly recognized that regulated electric utilities may furnish lighting services. The Commission's consistent exercise of this power for over two decades confirms this interpretation.[8]

---

[7] Petitioners' claim (Pet. 8) that the Court of Appeals also cited the definition of a "public service corporation" instead of a "public utility," is irrelevant, and, as the text demonstrates, the statement that "the state constitution and state statutes . . . confer no power . . . to regulate outdoor lighting" (Pet. 14) is flatly wrong.

[8] The fact that the legislature has amended the governing statutes (1971 Okla. Sess. Laws ch. 26, § 1, ch. 322, § 1 (amending Okla. Stat. tit. 17, § 151)) without changing the Commission's regulation of outdoor lighting further validates its interpretation. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (the legislature's amendment of "a statute giving rise to a longstanding administrative interpretation without pertinent change" is persuasive evidence of legislative intent); *see also*

Indeed, here, as the Court of Appeals found (A-9), the case for immunity is stronger than that found sufficient in *Southern Motor*. Here, the challenged conduct was compelled; in *Southern Motor*, the challenged conduct was "allowed" by the state commission (471 U.S. at 51). Here, rates became effective only after formal hearings and an independent written determination by the Commission; in *Southern Motor*, the rate-setting process was passive—"[a] proposed rate becomes effective if the state agency takes no action within a specified period of time" (471 U.S. at 50-51). Here, as the lower court concluded, "*the lower rate charged by PSO . . . , which plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey.*" A-7 (emphasis added).

In addition, the facts do not support petitioners' assertion that the Commission had engaged in "unauthorized bogus regulatory acts." Pet. 14. There is no claim of any dishonesty by PSO or the Commission in this case and the facts here are completely distinguishable from those in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), on which petitioners rely.[9] The

---

Oral Roberts Univ. v. Oklahoma Tax Comm'n, 714 P.2d 1013, 1016 (Okla. 1985) ("the legislature *adopts* an administrative construction of a statute when, subsequent to such construction, it amends the statute or re-enacts it without overriding such construction").

[9] Petitioners seriously misrepresent the law of state action immunity. For example, they quote from one of the opinions in *Cantor* (428 U.S. at 600) which they represent (Pet. 18) as "the law as laid down by this Court" when it in fact is taken from the plurality opinion, not the Court's opinion. *See Cantor*, 428 U.S. at 600. They also quote *dicta* (Pet. 13) from the D.C. Circuit decision in *Feldman v. Gardner*, 661 F.2d 1295 (D.C. Cir. 1981)

light bulb give-away program at issue in *Cantor* predated state regulation, continued without any affirmative addressing of the issue by the state, was not the practice of any other regulated utility in the state and was undertaken voluntarily by the utility. *Id.* at 583-85. Here, in contrast, rates for outdoor lighting service were established by the Commission long after the regulatory regime was in place; these rates were affirmatively addressed by the Commission in public hearings and written rate orders (D.Exs. 4, 5 (C.A.App. B, C)); Commission regulation of outdoor lighting is the uniform practice for regulated utilities in Oklahoma; and *it is undisputed that PSO was compelled to obey the challenged rate Orders at the time.*

For all of these reasons, the Court of Appeals correctly held that Oklahoma law reflected the state's intent to displace competitive forces in the setting of rates for electricity and outdoor lighting services provided by regulated electric utilities.

B. The Oklahoma Corporation Commission Exercised Active Supervision Over These Rates.

As this Court explained in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), "[t]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." In *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988), the Court elaborated that the supervision requirement assures that immunity will protect private conduct only when "in the judgment of the State, [it] actually further[s] state regulatory

---

which this Court has vacated. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

policies." Thus, "the State [must] exercise ultimate control over the challenged anticompetitive conduct." *Id.*

In *Patrick*, the Court rejected immunity because hospital privileges had been denied in the first instance by private parties and there was no effective mechanism for state reexamination. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987), the Court rejected immunity because neither California nor New York examined the privately posted wine and liquor prices to determine whether they were consistent with state policy. Accordingly, *Patrick, Midcal* and *Duffy* are all different from the present case because here the state agency determined the challenged rates in the first place. This alone satisfies the supervision requirement.

However, the case for immunity is even stronger here because, as the Court of Appeals correctly found, the Commission has used its authority "to closely supervise the outdoor lighting services provided by public utilities, including PSO." A-7. For example, "[f]rom 1977 to 1985, PSO submitted monthly reports to the Commission of its compliance with the fuel adjustment clause in its outdoor lighting rates." *Id.* Thus, even after the Commission determined the permissible rate, it closely monitored PSO's performance to assure compliance.[10]

---

[10] In the case of a utility which does not obey an approved tariff, the Commission has the statutory authority to impose fines of $500 per day (Okla. Stat. Ann. tit 17, § 1 (West 1986)), to hold the utility in contempt (*id.* § 2) and to order refunds (*id.* § 121).

Petitioners' argument that *Parker* requires regulation of all lighting competitors is in error. Pet. 17. *The issue here is whether the rates charged by the regulated utility are immune.* So long as the state's action in setting the utility's rates meets the test of *Southern Motor*, the state is free to displace any portion of competition which it determines serves state policy. On petitioners' theory, immunity would—quite perversely—be available only when the state had eliminated all competition. *Cf. Southern Motor*, 471 U.S. at 61.

Finally, petitioners' reliance on the 1978 deposition testimony of the General Counsel of the Commission and one Commissioner, to show that the Commission failed to take into account competitive factors, is also misplaced. Pet. 16. Immunity depends on the state assuring that the challenged act serves state policy. It does not depend on the state's providing a mini-antitrust trial to assess competitive impacts. The entire thrust of state action immunity is that the states are free to implement their own public policies even if they are anti-competitive. *Cf. Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978). In any event, petitioners' arguments were expressly considered and rejected by the Commission in 1980 in favor of the state policy of promoting security and balancing the system load factor. This, of course, is precisely the role that state regulatory commissions are intended to play.

For all of these reasons, the Court of Appeals correctly determined that the challenged rates were supervised by the state.

C. The State Court's Later Decision Overturning the Commission's Outdoor Lighting Order Does Not Diminish the Applicability of State Action Immunity.

The Court of Appeals correctly concluded that the 1984 state court decision did not alter PSO's duty to comply with Commission-mandated outdoor lighting rates in effect prior to that time. A-7. Under these circumstances, the Court of Appeals reasoned that immunity should be available because:

> there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp. 1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance does not later subject them to antitrust liability.

A-8. The court further held that there was no reason to anticipate the state court's ruling because:

> [u]ntil the 1984 decision, the Oklahoma Supreme Court had never overturned a decision by the Commission involving the outdoor lighting of a regulated utility. Indeed, the court affirmed the 1975 "atomic bomb" order challenged in the instant case . . . .

Id. In addition, the lower court pointed out that the 1984 state court decision "may reasonably be interpreted as only requiring evidence that outdoor lighting is useful to ratepayers, rather than as a limit on the Commission's jurisdiction . . . ." A-8n.4. This, of

course, is how the Commission has interpreted it. *See supra* p. 6.

Several additional factors bolster the lower court's decision on this point. The Commission determined the $3.85 "atomic bomb" rate. Petitioners neglected to complain about it during the 1975 rate proceedings, or to appeal that Order or to obtain a stay of the Order pending appeal, as Oklahoma law allows. *See* Okla. Const. art. IX, § 21. The Supreme Court of Oklahoma affirmed that rate Order in 1977. When petitioners later complained through an intervenor in the 1980 rate proceedings, the Commission ruled against them. Thus, by the time the state court announced its corrected decision on October 1, 1984, PSO had complied with the apparently lawful orders of the Commission for over 9 years.[11]

In these circumstances, there are two special reasons for immunity. First, "fairness for the private defendant caught in the conflicting structures of a federal system" strongly supports immunity here. I P. Areeda & D. Turner, *Antitrust Law* ¶ 217b2, at 109 (1978) (emphasis added). "The considerations of fairness are the obvious ones. One should not be punished with treble damages for acts reasonably thought lawful when committed." *Id.*

---

[11] Petitioners' contention that this Court is "required to give preclusive effect" to the state court ruling (Pet. 5) in determining state action immunity is in error. *Town of Hallie*, 471 U.S. at 44n.8 (although potentially relevant, a state court "opinion does not, of course, decide . . . immunity under the *federal* antitrust laws"). Further, the contention that PSO is collaterally estopped by the state court decision (Pet. 6) is inapposite. The issue in this litigation is whether PSO is immune for conduct in compliance with Commission orders *prior* to the state court decision.

Second, the state's interest in implementation of its regulatory program extends beyond merely obtaining obedience to its regulatory command. The state also seeks "ungrudging compliance . . . and voluntary participation in its regulatory structures." *Id.* If private parties believe they risk unfair treatment by being caught between the "jaws" of state regulatory policy and antitrust treble damages, then their cooperativeness with the regulatory program will undoubtedly be chilled. *See Hoover v. Ronwin*, 466 U.S. 558, 580n.34 (1984) ("the threat of being sued for damages" will deter voluntary cooperation). If voluntary compliance were undermined in this manner, then every routine state agency proceeding could be transformed into a lawyer's marathon of protest and appeal which would stymie state policy as effectively as the reversal of *Parker* itself.

For these reasons, the Court of Appeals correctly held that the 1984 state court decision did not diminish PSO's immunity.

II. The Court Of Appeals Decision Is Supportable On Alternative Grounds.

The Court of Appeals' decision also does not warrant review by this Court because it is supportable on four alternative grounds.

A. *Noerr-Pennington Immunity.* Respondent's conduct in petitioning for and implementing the challenged rates is immune under the *Noerr-Pennington* doctrine.[12] As the Fifth Circuit Court of Appeals has

---

[12] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

recognized, the First Amendment right to petition "would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success." *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1505 (1985) (Higginbotham, J.). Moreover, *Noerr-Pennington* immunity applies even if the agency action is later overturned.[13] *Id.* at 1499-1500.

B. *No Specific Intent to Monopolize.* To establish their attempted monopolization claim, petitioners were required to prove, and the Court of Appeals correctly held that they "failed to show . . . a specific intent to monopolize . . . ." A-11.

C. *No Dangerous Probability of Success.* Petitioners were also required to show that "there existed a dangerous probability of PSO succeeding in monopolizing the relevant market by proving it had the ability to control prices and exclude competition." A-12n.6. Petitioners also failed to prove this element which, as the Court of Appeals noted, "would have been a very difficult task," because the Commission regulated PSO's rates. *Id.*

D. *No Relevant Product Market.* Finally, the petitioners failed to prove that the market consisted of leased 175 and 400 watt lights and excluded all purchased lights and all other types and sizes of lights. The evidence established that purchased and leased

---

[13] *See also Subscription Television, Inc. v. Southern Cal. Theater Owners Ass'n*, 576 F.2d 230 (9th Cir. 1978); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.2a, at 28 (Supp. 1988).

lights are reasonably interchangeable,[14] as are 175, 400 and 1000 watt lights.[15] Thus, in the market defined by the evidence, PSO had less than a 1.4% share,[16] which is insufficient as a matter of law to support a claim of attempted monopolization.[17]

III. The Court Of Appeals Decision Is Based On Unusual Facts Which Limit Its Significance.

This Court should also deny the petition because the decision below is based on unusual facts and will have little practical significance beyond the immediate parties. The state uniformly regulated all 34 utility outdoor lighting services and only one of those has ever been overturned. Moreover, this one utility tariff

---

[14] *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). More than 96% of the lights were purchased, not leased. Tr. 1166-67; D.Ex.11(B) (C.A.App. F). Moreover, on at least eighteen occasions, petitioners' own customers changed from leasing to purchasing lights. Tr. 1483-90, D.Ex.17(a) (C.A.App. G) at 1-11; D.Ex.17(b) (C.A.App. G) at 7-17, 20-25, 31-41; D.Ex.17(c) (C.A.App. G) at 6-9; D.Ex.17(d) (C.A.App. G) at 3-7, 12-14. Petitioners' lease agreements often included an option to purchase at the end of the lease, which at least some of petitioners' customers exercised. Tr. 579, 581; D.Ex.17(b) (C.A.App. G) at 26, 35-37.

[15] On at least eight occasions, petitioners' own customers replaced either 175 or 400 watt lights with 1000 watt lights. Tr. 1474-82, 1520-21; D.Ex.18(a) (C.A.App. L) at 1-20; D.Ex.18(b) (C.A.App. L) at 3-6. Petitioners also replaced 1000 watt lights with 400 watt lights. Tr. 1522-23, D.Ex.18(b) (C.A.App. L) at 7-9.

[16] Tr. 1773-74.

[17] *See, e.g., Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 429 (D.C. Cir.), *cert. denied*, 107 S. Ct. 181 (1986) ("[a]s a matter of law, a market share [from 1.8 to 4.5%] cannot support a monopolization claim.").

had been subject to two formal Commission proceedings and had been affirmed by the state supreme court once before it was overturned.

In addition, the Corporation Commission has never authorized a special electricity rate for competing providers of outdoor lighting services for any of the other 33 regulated electric utilities in the state. Pet. 4, 17. Finally, even if petitioners were correct about the absence of immunity for the outdoor lighting rate, the rate for electricity which raised their costs by 79% would still be immune.

IV. The Court Of Appeals Decision Does Not Warrant Review By This Court Merely To Reexamine The Evidence Or Inferences To Be Drawn From It.

Petitioners argue extensively about the facts of this case in an effort to cloud the applicability of the state action doctrine to PSO's challenged rates. *See, e.g.*, Pet. 19. In doing so, they commit two serious errors which underscore the inappropriateness of review by this Court. First, they in effect are asking this Court "merely to review the evidence or inferences drawn from it," which this Court has long declared it will not do. *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938).

Second, petitioners seriously misstate the evidence of record. Petitioners quote the testimony of PSO's Vice President out of context and offer it for the proposition that PSO "decides what it wants to charge." Pet. 19. In fact, the referenced testimony clearly establishes that PSO's rates are set by the

Commission.[18] The record also flatly contradicts petitioners' claim (Pet. 19) that PSO did not have approved outdoor lighting rates before 1975. PSO had Commission-approved outdoor lighting rates at least as early as 1959, and a Commission-approved rate for commercial and industrial outdoor lighting as early as 1968. *See* App. I-1 (Nos. 1,2); App. I-3 (Nos. 9,10,11). Petitioners' own witness testified that PSO's outdoor lighting rates were regulated by the Commission since at least 1972. Tr. 904-05.

Petitioners' claim (Pet. 19) that in 1967 PSO was found to be furnishing service without Commission approval is also in error. The witness referred to by petitioners could not identify any PSO outdoor lighting rates which had not been approved. Tr. 860. Finally, petitioners' other contentions that certain rates were not filed or approved, are not supported by citations to the record, and, in any event, are contradicted by the 47 approved outdoor lighting tariffs summarized at Appendix I, which cover PSO's service from 1959-1984.

---

[18] Q: Now then, in the early days when you first supplied outdoor lighting will you tell the court and jury how the rates for outdoor lighting were created? How did you decide what to charge?

A: In the early days I, Mr. Walker, cannot answer that because the rate department decided what it was to charge, and I as a service engineer took the rates they had developed and had priced and had presented to the Commission, *and had been approved by the Commission*, and this is what I worked with was the finished product, if you please.

Tr. 1056-57 (emphasis added).

Finally, these unsupported factual contentions are largely irrelevant. There is no dispute that the "atomic bomb" rates which are the heart of the petitioners' case were established by the Commission. A-7.

CONCLUSION

For all of the foregoing reasons, Respondent Public Service Company of Oklahoma prays that the petition for writ of certiorari be denied.

Respectfully submitted,

Ferd. C. Meyer, Jr.
Stanley P. Wilson
CENTRAL AND SOUTH WEST CORPORATION
2121 San Jacinto Street
Suite 2500
Dallas, Texas 75266
(214) 754-1000

Of Counsel

Jeffrey H. Howard*
Linda E. Benfield
MILLER & CHEVALIER, CHARTERED
655 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005-5701
(202) 626-5800

**Counsel of Record*

Counsel for Respondent

December 14, 1988

APPENDIX

APPENDIX I

OUTDOOR LIGHTING TARIFFS OF PUBLIC SERVICE COMPANY OF OKLAHOMA APPROVED BY THE OKLAHOMA CORPORATION COMMISSION

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
1. 1/13/59	Existing customers-yard lighting	All PSO urban and suburban areas	$3/$2.50 per month	22
2. 1/13/59	Existing customers-yard lighting	All PSO rural areas	$3/$2.50 per month	24
3. 5/3/62	All existing customers	All areas	$4 per month	26
4. 12/28/62	Existing customers-yard lighting-closed to new customers	All PSO urban and suburban areas	$3/$2.50 per month	23

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
5. 12/28/62	Existing customers-yard lighting-closed to new customers	All PSO rural areas	$3/$2.50 per month	25
6. 12/28/62	Existing customers	All areas	$4 per month	27
7. 8/11/64	Existing residential customers	All areas	$2.75/$3.25 per month	28
8. 5/31/66	Existing residential customers	All areas	$2.75/$3.25 per month	30

9. 11/18/68	Existing commercial and industrial customers	Tulsa urban and suburban areas	$4 per month	41
10. 11/18/68	Existing commercial and industrial customers	All areas except Tulsa urban and suburban	$2.75/$3.25/ $5.10 per month	47
11. 11/18/68	Electrical contractors leasing outdoor lighting for commercial and industrial establishments	Urban Tulsa area	$10/$25/$60 per year	7
12. 3/22/72	All customers	Jenks and Vicinity	$2.50 per month	35
13. 7/18/74	Residential customers	All areas	$2.75/$3.25 per month	32

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
14. 7/18/74	All customers	Jenks and Vicinity	$2.50 per month	37
15. 7/18/74	Existing commercial and industrial customers	Tulsa urban and suburban areas	$4 per month	42
16. 7/18/74	Amending commercial and industrial customer rate	All areas except Tulsa urban and suburban areas	Amend terms of payment and fuel clause	49

17. 7/18/74	Electrical contractors leasing outdoor lighting for commercial and industrial establishments	Urban Tulsa area	$10/$25/$60 per year	8	
18. 5/29/75	Any customer-metered outdoor lighting	All areas	2.188¢ per kilowatthour	10	
19. 5/29/75	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.35-$7.86 per month	51	
20. 5/29/75	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.41-$24.99 per month	67	

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
21. 9/29/77	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	13
22. 9/29/77	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	55
23. 9/29/77	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	71

24.	7/31/78	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	16
25.	7/31/78	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	59
26.	7/31/78	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	75
27.	12/15/80	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	19

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
28. 12/15/80	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	63
29. 12/15/80	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	79
30. 10/2/81	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	158

31. 10/2/81	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	174
32. 10/2/81	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	190
33. 1/18/82	Any customer-metered outdoor lighting	All areas	5.081¢ per kilowatthour	162
34. 1/18/82	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$5.94-$13.71 per month	178

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
35. 1/18/82	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.06-$41.42 per month	194
36. 6/4/82	Any customer-metered outdoor lighting	All areas	5.321¢ per kilowatthour	165
37. 6/4/82	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$6.09-$14.03 per month	181

38.	6/4/82	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.17-$42.19 per month	197
39.	1/24/83	Any customer-metered outdoor lighting	All areas	5.321¢ per kilowatthour	169
40.	1/24/83	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$6.09-$14.03 per month	185
41.	1/24/83	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.17-$42.19 per month	201

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
42. 2/24/84	Any customer-metered outdoor lighting	All areas	5.321¢ per kilowatthour	172
43. 2/24/84	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$6.09-$14.03 per month	188
44. 2/24/84	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.17-$42.19 per month	204

45. 2/24/84	Any customer under OCC rate schedule with fuel cost adjustment rider	All areas	Fuel cost adjustment rider	234
46. 2/24/84	Any customer under OCC rate schedule with tax adjustment rider	All areas	Tax adjustment rider	236
47. 2/24/84	Any customer under OCC rate schedule with fuel over/under recovery rider	All areas	Fuel over/under recovery rider	237